Supreme Court, U.S.
FILED
MAR 0 1 2000
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No. 99-1289

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,

ex rel.

AMERICAN TEXTILES MANUFACTURERS INSTITUTE, INC.,

Petitioner,

v.

THE LIMITED, INC., *et al.*,
TARRANT APPAREL GROUP, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

THE LIMITED RESPONDENTS' BRIEF IN OPPOSITION

MICHAEL J. CANTER
VORYS, SATER, SEYMOUR and PEASE
52 E. Gay Street
Columbus, Ohio 43215
(614) 464-6400

JOHN T. BOESE
(Counsel of Record)
MICHAEL L. WALDMAN
FRIED, FRANK, HARRIS, SHRIVER & JACOBSON
1001 Pennsylvania Avenue, NW,
Suite 800
Washington, DC 20004
(202) 639-7000

Counsel for Respondents The Limited, Inc., et al.

Bulmer Legal Publishing Services, Washington, D.C. 20005 (202) 682-9869

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QUESTIONS PRESENTED

1. Whether the court of appeals was correct in holding that an alleged statutory or regulatory violation which might lead the Government to attempt to assess a fine, duty or forfeiture did not constitute "an obligation" under the False Claims Act, where (a) the court of appeals carefully and correctly reviewed the statutory language, legislative history, and reasonable interpretations of the language of the Act, and (b) the court of appeals expressly followed the only other circuit court to address this issue?

2. Whether the court of appeals was correct in addressing the merits, where (a) plaintiff's motion to disqualify the district judge and vacate his decision was based solely upon the district judge's having previously been represented by one of the party's counsel in an unrelated matter which had been concluded, (b) a second district judge had engaged in a *de novo* review of the decision on the merits, and (c) the petitioner had requested in its appellate briefs that the court of appeals address the merits?

PARTIES TO THE PROCEEDING BELOW

The Petition for Writ of Certiorari listed the "Petitioners" as "United States of America ex rel. American Textile Manufacturers Institute, Inc." In fact, the petitioner is the American Textile Manufacturers Institute, Inc. It should be noted that the United States of America, represented by the U.S. Department of Justice, did not join this petition.

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

THE LIMITED RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

In its Complaint in this case, Petitioner American Textile Manufacturers Institute, Inc. ("ATMI" or "Petitioner") alleges that Respondents engaged in "transshipment" to avoid import quotas and that its garments were really manufactured in the People's Republic of China, rather than in Hong Kong or Macau as stated on its customs documents. Even under Petitioner's theory, however, the United States suffered no monetary loss from this alleged transshipment since the customs duties were the same whether China, Macao or Hong Kong was designated as the country of origin. Although the United States was not defrauded of any

money, Petitioner attempts to create a False Claims Act case using a dangerous new theory of liability. Petitioner in this action seeks to create False Claims Act liability based on the fines, duties or forfeitures which Respondent might have been subject to under the criminal and civil laws governing inaccurate customs documentation. Under Petitioner's theory, any privately alleged violation of a statute, regulation or administrative rule which, if proved, might have resulted in a fine, duty or forfeiture becomes an "obligation" to the United States and, thereby, serves as the basis for a reverse false claims action under 31 U.S.C. § 3729(a)(7).[1]

Petitioner's theory would completely detach the False Claims Act from its moorings in government contracts, government paid healthcare programs, and other commercial transactions with the government. Instead, the Petitioner would have any alleged false statement to the United States in any regulatory context constitute a basis for a reverse false claim under Section 3729(a)(7). Not surprisingly, the court of appeals found no support for such an unprecedented interpretation of the False Claims Act and dismissed Petitioner's Complaint as a matter of law.

Petitioner also attacks the original district judge for failing to disqualify himself based on having been represented in an unrelated matter by one of the parties' law firms. This representation had concluded prior to the case being randomly assigned to the district judge's docket. The district judge sought and received an informal opinion from a member of the Judicial Conference Codes of Conduct Committee, who advised that the district judge was not required to disqualify himself after his representation by the law firm was concluded. Nevertheless, in response to the Petitioner's motion below, the district judge voluntarily recused himself so that

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[1] In its petition, ATMI speaks often of "unconditional" obligations. Yet, this phrasing is misleading given that petitioner is relying on potential future fines, duties, or forfeitures which might be assessed if the government were to exercise its discretion to proceed against Respondents and if a court were to rule in favor of the government. These so-called "obligations" are, therefore, highly contingent and far from "unconditional."

a new district judge could review *de novo* his decision to dismiss ATMI's lawsuit. The second district judge issued a lengthy opinion reaching the same legal conclusion that the Complaint failed to state a claim under the False Claims Act. In its brief to the court of appeals, Petitioner expressly requested that the court address the merits of the case. Noting that the False Claims Act issue was a pure question of law, the U.S. Court of Appeals for the Sixth Circuit addressed the merits of the district court's dismissal and did not find it necessary to reach the disqualification question.

REASONS FOR DENYING THE PETITION

I. THE FALSE CLAIMS ACT ISSUE DOES NOT WARRANT REVIEW

A. The Court of Appeals Correctly Interpreted the Meaning of "Obligation" Under 31 U.S.C. § 3929(a)(7) of the False Claims Act

The court of appeals concluded that the term "obligation" of the reverse false claims provision of the False Claims Act includes "acknowledgements of indebtedness, final judgments, and breaches of government contracts," but does not encompass the potential fines, duties and forfeitures alleged by Petitioner. (App. 25). Petitioner contends that in reaching this result, the Sixth Circuit relied on "policy" and not a careful legal analysis of the statute. This is simply untrue. The court of appeals in this case engaged in a thorough review of the statutory language, legislative history, and reasonable intepretations of the statute.

1. The court of appeals examined the plain language of Section 3729(a)(7). (App. 13-15). It found no support for Petitioner's assertion that possible fines, forfeitures or penalties which might result from the statutory or regulatory violations are "obligations" under the statute. Section 3729(a)(7) requires that, to state a "reverse false claim," the plaintiff must knowingly assert a "false record or statement to conceal, avoid or decrease an *obligation* to pay . . . the Government." 31 U.S.C. § 3729(a)(7). "Obligation" is nowhere defined in the statute. There is nothing in

the language of Section 3729(a)(7) about *potential* obligations, nor about attempts to avoid *possible* monetary fines or penalties that might arise sometime in the future. The Sixth Circuit's review of Black's Law Dictionary demonstrated that "obligation" has several meanings and these meanings vary "according to the context in which it is used." (App. 13).

As the court of appeals noted, the contrast between the broad use of "claim" in most provisions of § 3729(a) and its limited use of "obligation" in § 3729(a)(6) & (7) indicates that "obligation" had a different, and more limited, meaning. Moreover, Section 3729(a)(6) confers liability on one who knowingly buys, "or receives as a pledge of an obligation or debt, public property from an officer or employee of the Government . . . who lawfully may not sell or pledge the property." "Obligation," when used in Subsection (a)(6), could only be moneys currently due since no one would exchange property for any inchoate obligation, but only for a real, current debt. This fact indicates that the term "obligation" in Section 3729(a)(7) cannot include potential future liabilities, such as possible fines, duties and forfeitures.[2]

2. The court of appeals also reviewed the legislative history of Section 3729(a)(7). (App. 15-16). The legislative history of Section 3729(a)(7) also does not support the Petitioner's

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[2] Although the court of appeals found the term "obligation" to be ambiguous, (App. 20), Respondents believe that the plain meaning of "obligation" directly contradicts Petitioner's theory that the term "obligation" includes possible forfeitures, duties and fines which might be assessed in the future. As defined by most dictionaries, "obligation" involves an actual and existing duty. *See, e.g., Webster's Third New International Dictionary* 1556 (3d ed. 1986) (defining "obligation" as "a formal and binding agreement or acknowledgment of a liability to pay a specified sum or do a specific thing . . . an imperative duty"). This also is consistent with the U.S. Government's own definition, which provides that a mere contingent or potential liability "is by definition not sufficiently definite or certain to support the formal recording of an obligation." GAO Appropriations Law Handbook, at 7-48. It would be contrary to the common, ordinary understanding of the term to conclude that one has an "obligation" to pay a fine or penalty based on a statutory or regulatory violation before it has been assessed, before the Government determines whether such a violation exists, and before the Government even decides that it is appropriate for enforcement.

interpretation of "obligation." This reverse false claims provision was added to the False Claims Act in 1986 in response to a number of court decisions, involving concessionaires on public lands, payments for postage and the like, which had construed "claim" not to include alleged fraud involving moneys paid to (and not by) the United States. In these cases, there existed an undisputed obligation to pay the United States and the defendant simply engaged in fraudulent attempts to avoid paying the United States the full amount due. The legislative history makes clear that Congress' purpose in passing Section 3729(a)(7) was simply to close this narrow loophole. *See* S. Rep. No. 99-345, at 9, 15 (1986); H. Rep. No. 99-660, at 20 (1986).

Moreover, in discussing this provision, Congress spoke in terms of attempts by contractors to avoid paying "money owed" the United States. The phrase "money owed" evokes "Black's Law Dictionary's definition of 'liabilities created by contracts of laws (i.e., judgments)' – and the [legislative] history cites as examples cases involving disputes over taxes, contracts, and leases." (App. 16). Nowhere did Congress express any desire to bring "potential" or "future" monetary obligations within the ambit of the Act. Nor did Congress express any desire to dramatically expand the scope of the Act by turning every possible statutory and regulatory violation with monetary penalties into an "obligation" under the Act.

3. The court of appeals also considered the practical consequences of the competing interpretations as part of its attempt to discern what Congress intended "obligation" to mean. (App. 20-23).[3] There is no evidence that Congress intended the wide-ranging

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[3] Contrary to Petitioner's charges of rampant judicial policymaking, the court of appeals was itself very conscious of its limited ability to take policy considerations into account. As the court of appeals stated:

> Of course, a court may not allow policy considerations to trump the plain language of the statute. Here, however, Congress has used an ambiguous term, and considering policy implications helps to inform us what Congress intended 'obligation' to mean . . .

(App. 20) (citations omitted).

consequences inherent in the radical theory of liability advocated by the Petitioner. The Petitioner's theory would untether the False Claims Act from its connection to transactions where the defendants have a contract or lease with the government or have asked for money or benefits from the government. (App. 20). As the Sixth Circuit noted, "If the reverse false claims provision encompasses the [Limited] defendants' actions, it has incredible scope, permitting suits against any person who makes a false statement to the federal government that he did not commit a statutory or regulatory violation that might have led to the imposition of a fine, payment of liquidated damages, imposition of a tax, of forfeiture of property." (App. 21). Petitioner's theory also would mean that any false statements made to conceal potential criminal liability would fall within the civil False Claims Act. (App. 21-22). There is no reason to believe that Congress intended to unleash the "probable flood of litigation" that would follow from Petitioner's overly expansive interpretation of "obligation" under Section 3729(a)(7). (App. 20).[4] Moreover, as the court of appeals recognized, "[r]ejecting the expansive interpretation does not

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[4] Petitioner's theory would allow the False Claims Act to be used by any citizen for enforcement of the Occupational Health and Safety regulations, environmental laws, firearms laws, pharmaceutical regulations, food and drug laws, and other regulatory and administrative schemes. (App. 56-60). As the district judge commented:

> The language Congress used and the legislative history simply cannot be reconciled with the recognition that literally millions of records are maintained by every business engaged in commerce within the United States; that a failure to maintain accurate records frequently subjects the business to sanctions under specific statutes and regulations; and that innumerable private lawsuits could be filed if the FCA is viewed as a tool to obtain a damage award for improper or inaccurate record keeping that fails to reflect some alleged violation of federal law. If that is what Congress intended, it should have plainly said so.

(App. 61).

reward wrongdoers, of course, as they still face penalties for violating the underlying statute . . ." (App. 23).[5]

B. The Court of Appeals Expressly Followed the Only Other Court of Appeals' Decision to Address the Meaning of "Obligation"

It is telling that the Petitioner does not even attempt to assert a conflict among the lower courts. In fact, the court of appeals expressly followed the only other circuit court case to address the meaning of "obligation" and is entirely consistent with the leading district court decision on this issue.

1. The Eighth Circuit in *United States v. Q International Courier, Inc.*, 131 F.3d 770 (8th Cir. 1997), rejected the unreasonably expansive interpretation of "obligation" advocated by Petitioner here. The United States alleged that Q International and other defendants had submitted reverse false claims under 31 U.S.C. § 3729(a)(7), in connection with their shipping bulk mail offshore and then remailing to the United States to take advantage of the lower international postage rates from certain foreign countries (*i.e.*, Barbados) to the United States. 131 F.3d at 772. The Eighth Circuit noted that "the statutes and regulations that the United States cites might well support a judgment that one or more of the defendants engaged in illegal and fraudulent activity, but those statutes and regulations do not create a legal duty for the defendants to pay domestic postage." *Id.* at 773. The *Q*

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[5] The perversity of Petitioner's theory is evident from the fact that it would require piling penalties upon penalties. The False Claims Act itself calls for treble damages and $5,000 to $10,000 penalties per false claim. Yet, the Petitioner bases its "obligation" under the False Claims Act on various unassessed criminal and civil penalties. The Petitioner, therefore, would have the False Claims Act damages calculated by trebling the possible criminal and civil fines and penalties, and adding the FCA penalties of $5,000 to $10,000 each, all without any loss to the Federal Treasury. And the defendant, theoretically, would still be subject to those criminal and civil fines for the underlying statutory violations should the Customs Service or Justice Department decide to proceed.

International court concluded that the "obligation" must be an existing, specific legal duty comparable to a debt enforceable at common law.

> To recover under the False Claims Act, we believe that the United States must demonstrate that it was owed a specific, legal obligation at the time that the alleged false record or statement was made, used, or caused to be made or used. *The obligation cannot be merely a potential liability: instead, in order to be subject to the penalties of the False Claims Act, a defendant must have had a present duty to pay money or property that was created by a statute, regulation, contract, judgment, or acknowledgment of indebtedness.* The duty, in other words, must have been an obligation in the nature of those that gave rise to actions of debt at common law for money or things owed.

Id. at 773 (emphasis added).

The Eighth Circuit firmly rejected the notion on which the Petitioner's action is based here – that false statements to avoid potential fines or penalties could serve as the basis for a claim under 31 U.S.C. § 3729(a)(7). According to the Court:

> A potential penalty, on its own, does not create a common-law debt. A debt, and thus an obligation under the meaning of the False Claims Act, must be for a fixed sum that is immediately due. This [Postal] regulation merely provides a range of penalties that might be assessed; it does not create an immediate duty to pay a specific sum.

Q International, 131 F.3d at 774 .

The court of appeals in the instant case discussed the Eighth Circuit's decision in *Q International*, including setting out the above quotations in their entirety, (App. 10-13), leaving no doubt that the Sixth Circuit followed the *Q International* court's ruling:

> *We agree with the reasoning of the Eighth Circuit.* Thus, we hold that a reverse false claim action cannot

> proceed without proof that the defendant made a false record or statement at a time that the defendant owed the government an obligation sufficiently certain to give rise to an action of debt at common law.

(App. 13) (emphasis added).[6]

2. The court of appeals' decision also is consistent with the leading district court opinion analyzing the meaning of "obligation" under Section 3729(a)(7). (App.12). In *United States ex rel. S. Prawer & Co. v. Verrill & Dana*, 946 F. Supp. 87 (D. Me. 1996), cited with approval by the *Q International* court, the district court dismissed the reverse false claims action, ruling that no "obligation" existed within the meaning of Section 3729(a)(7) at the time that the lawyer defendants undertook their allegedly improper actions. The *Prawer* court took a narrower view of "obligation" than that espoused by the plaintiffs and concluded that potential recoveries were not "obligations" under Section 3729(a)(7) until a judgment was entered:

> "[O]bligation" in the False Claims Act refers to something more than potential liability or moral or social duty; a legal obligation seems to be the touchstone. I may negligently cause damage to another in a car accident, but morality aside, I have no tort-based obligation to pay or transmit money to her until she obtains a judgment . . . I may even violate the False Claims Act, but until the government or private relators obtain judgment, I have no obligation to pay or transmit money . . . . In fact, the legislative history twice refers to "money owed," as the kind of obligation that the reverse

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[6] In *United States v. Pemco Aeroplex, Inc.*, 195 F.3d 1234 (11th Cir. 1999) (en banc), the Eleventh Circuit cited to both the Sixth Circuit's decision here and the Eighth Circuit's decision in *Q International*. The Eleventh Circuit expressed no disagreement with these other decisions, and simply distinguished Pemco's situation since it involved a written government contract with express obligations to account for government property.

> false claims prohibition is designed to cover. Money is not "owed" without a specific contractual remedy, a judgment or an acknowledgment of indebtedness.

Prawer, 946 F. Supp. at 94-95 (citations and footnotes omitted).[7] *See also United States ex rel. Lamers v. City of Green Bay*, 998 F. Supp. 997-98 (E.D. Wis. 1998) ("find[ing] the reasoning underlying the [*Q International*] decision to be persuasive" and permitting reverse false claims only where the defendant has "an immediate, recognizable obligation" to pay the government), *aff'd*, 168 F.3d 1013 (7th Cir. 1999).

C. This Case Is Anomalous and Lacks Broader Importance

Petitioner appears to contend that the decision of the court of appeals is important to the enforcement of customs law and the False Claims Act. This contention cannot survive scrutiny.

1. Petitioner asserts that, by dismissing its *qui tam* lawsuit, the court of appeals "makes it impossible for private parties to assist their government to combat Customs fraud . . ." (App. 21). Yet, this statement is contradicted by Petitioner's own brief. As Petitioner points out at its footnote 2, the customs statutes already provide large rewards to whistleblowers who bring customs violations to the attention of government authorities. *See, e.g.*, 19 U.S.C. § 1619 (person who furnishes information to government prosecutors or customs officer that leads to penalties or a judgment is entitled to 25% of the government's recovery); *John Doe v. United States*, 100 F.3d 1576, 1582-83 (Fed. Cir. 1996) (describing

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[7] The *Prawer* court concluded that the type of broad interpretation of "obligation" that would cover potential fines, duties or forfeitures would know no bounds:

> Otherwise, however, there appears to be no way to define the scope of such cases, which would seem to be as broad as any lawyer's creative impulses in defining a possible claim in the first place.

946 F. Supp. at 94 n.12.

operation of reward to customs informers). The ability to recover under the False Claims Act is superfluous in light of the pre-existing statutes encouraging customs whistleblowers.

Petitioner's claim of a deleterious impact on customs law enforcement also is belied by the fact that its petition fails to cite to a single other False Claims Act case based on potential fines and penalties under the customs laws. There is no long line of False Claims Act cases involving customs violations that have been previously filed and pursued, nor are there vast numbers of such cases presently pending. The court of appeals was not cutting off a major area of False Claims Act prosecutions. Rather, Petitioner's radical new legal theory – to somehow bootstrap possible fines, duties and forfeitures under the customs laws to the False Claims Act and its *qui tam* provisions – had never been previously tried for the simple reason that it is wholly without merit.

2. Petitioner also asserts that the Sixth Circuit's decision will have a broad impact on the enforcement of the False Claims Act. The court of appeals, however, went to great lengths to limit the scope of its decision. Analyzing the scope of the term of "obligation," the court explicitly declined to reach the issue of whether the reverse false claims provisions would extend to all obligations created by statute or regulation. (App. 17, 25). Furthermore, to the extent that it opines on this issue, the court of appeals appears to favor a broad, pro-enforcement view whereby obligations created by statutes or regulations that are "essentially contractual in nature" would be covered by the Act. (App. 17-19). In its opinion, the Sixth Circuit was clear that the case before it did not involve statutes and regulations which were "essentially contractual in nature," but instead involved contingent obligations arising from possible civil and criminal penalties that might be imposed after a finding of wrongdoing which would only occur after exercise of administrative or prosecutorial discretion. (App. 19).

In addition, the Petitioner's grave concern for the impact of the Sixth Circuit's decision is not apparently shared by the United States, the chief beneficiary of the False Claims Act. It should be emphasized that the United States in its *amicus curiae* brief to the

court of appeals supported the Respondents in seeking affirmance of the dismissal of the action. While arguing for a different rationale, the United States' amicus brief fully and unequivocally supported the district court's dismissal of the Complaint on the express ground that the Petitioner's legal theory fell far beyond the scope of the proper application of the False Claims Act. In fact, as the court of appeals noted in its opinion, the United States previously had attacked the identical legal theory advanced by Petitioner here using powerful and emphatic language. (App. 23).[8]

D. This Case May Be Disposed of by This Court's Decision *In Vermont Agency of Natural Resources v. United States ex rel Stevens*

The United States elected not to intervene in this lawsuit. (App. 2). Accordingly, Petitioner ATMI has suffered no injury in fact and lacks standing under Article III to litigate claims of fraud upon the government. The Court has asked for briefing on this issue in *Vermont Agency of Natural Resources v. United States ex rel Stevens*, (No. 98-1828). That case was argued before this Court on November 29, 1999. A ruling by this Court that Stevens lacked

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[8] In *United States ex rel. Sequoia Orange Co. v. Oxnard Lemon Co.*, CV No. F-91-194 OWW (N.D. Cal. 1991), the United States moved to dismiss a False Claims Act case alleging possible statutory forfeitures and assessments for violating Agriculture Department regulations governing lemon shipping quotas, stating that

> an attempt to circumvent an obligation to pay created solely as a result of a violation of an administrative enforcement statute does not constitute a recognizable claim under the Act.
>
> . . .
>
> False claims submitted by individuals or entities seeking to avoid payment to the Government of administrative fines, penalties or forfeitures (OSHA, FAA, SEC, etc.), or criminal fines imposed pursuant to Title 18 of the United States Code, are not the stuff of False Claims Act lawsuits . . .

(App. 23).

standing will be determinative here and require dismissal of the instant case on standing grounds.

II. THE DISQUALIFICATION ISSUE DOES NOT WARRANT REVIEW

Petitioner also contends that this Court should grant certiorari to address the Sixth Circuit's "handling" of the district judge's alleged conflict of interest. This argument is flawed in at least two respects. First, the district judge did not have a conflict of interest. Second, in any event the court of appeals properly addressed the merits of the False Claims Act issues in light of the *de novo* treatment of these issues by a second district judge, the *de novo* nature of the Sixth Circuit's review, and the Petitioner's express request that the Sixth Circuit reach the merits.

A. The District Judge Correctly Ruled That Disqualification Was Not Required

Despite its innuendos and accusations against Judge Holschuh, Petitioner presented no legal or factual grounds requiring disqualification under 28 U.S.C. § 455(a). Indeed, the Committee on the Code of Conduct for United States Judges has spoken on the precise circumstance on which petitioner bases its argument – the judge's prior and concluded representation by a party's counsel – and found that disqualification is *not* required. *II Guide to Judiciary Policies and Procedures*, V-41, § 3.6-2(c) (1997) ("Where there is no existing or continuing attorney-client relationship, recusal is not required because the lawyer previously represented the judge. . ."). The lower courts that have considered this issue have uniformly held that recusal is *not* required where a party is currently represented by a law firm who had represented the trial judge in the past. *See, e.g., Duke v. Pfizer, Inc.*, 668 F. Supp. 1031, 1035-38 (E.D. Mich. 1987), *aff'd*, 867 F.2d 611 (6th Cir. 1989); *Miller Indus., Inc. v. Caterpillar Tractor Co.*, 516 F. Supp. 84, 86-88 (S.D. Ala. 1980); *In re Snowshoe Co.*, 137 B.R. 619, 620-22 (D.W.Va. 1991), *aff'd*, 953 F.2d 639 (4th Cir. 1992). Furthermore, Judge Holschuh received this very guidance – that disqualification was not required if the case was assigned to his docket after the representation by the law firm was concluded – when he sought

advice from a member of the Judicial Conference Codes of Conduct Committee.[9]

B. The Court of Appeals Properly Reached the Merits

The court of appeals explained that there was no reason to decide the disqualification issue, stating:

> In light of our disposition of the case as a matter of law, and given District Judge Beckwith's *de novo* review of District Judge Holschuh's decision, we see no need to decide whether Judge Holschuh faced mandatory recusal, and to require a third district judge to decide whether ATMI has stated viable claims.

(App. 28).

The Sixth Circuit was correct in addressing the merits of the False Claims Act issues in this case. Judge Beckwith's *de novo* review and opinion cured any possible problem relating to Judge Holschuh. It also is well settled that even in cases – unlike this one – where a violation of Section 455(a) has been established, vacatur is not required where the case involved a pure question of law and

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[9] Judge Holschuh explained that he telephoned a member of the Judicial Conference Codes of Conduct Committee, Judge James Jarvis, for advice:

> I asked Judge Jarvis whether Mr. Arnold's representation of me would require my recusal in cases in which the law firm of Vorys, Sater, Seymour and Pease appeared as counsel. . . Judge Jarvis did not express an opinion on behalf of the Committee, but his personal opinion was that I should not decide any matters involving the Vorys firm so long as I was being currently represented by Mr. Arnold, but that this representation would end upon the submission and payment of Mr. Arnold's statement for legal services, after which I would be under no obligation to recuse myself from cases in which Vorys, Sater had appeared as counsel.

(App. 76-77).

the district court's opinion was subject to *de novo* review.[10] Furthermore, Petitioner in its briefs below urged the court of appeals to decide the False Claims Act issues, regardless of the disqualification issue. *See* Plaintiff Brief Below, at 47-48 ("Given the unique circumstances of this case, the best course of action for this court to follow would be to review the merits of the Relator's claims under the False Claims Act. . . . [A] remand for further review by Judge Beckwith (without a decision on the merits) seems pointless and will add little to the eventual review of the merits of this case by this Court."); Plaintiff Reply Brief Below, at 24-25 ("This Court should address the merits of this case even if it concludes separately that reversal is required on the recusal and vacatur issues. . . . [Addressing the merits] would be particularly appropriate here where the issues are purely legal and there are no disputed issues of material fact. The interests of justice and judicial economy would be well-served, therefore, by this Court affirmatively finding whether Relator has stated viable causes of action under 31 U.S.C. § 3729(a)(7).").

Petitioner fails to explain what purpose or relevance would have been served by the Sixth Circuit reaching the disqualification issue where it was already engaging in plenary review of the district court's ruling on the merits.[11] It makes little sense for the court of appeals to struggle with disqualification issues where the court

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[10] See *In re Continental Airlines, Corp.*, 901 F.2d 1259, 1263 (5th Cir. 1990) (no need to vacate summary judgment ruling; "In cases where we would otherwise affirm such a ruling, little would be gained by vacating and remanding with instructions that it be essentially reinstated."); *Parker v. Connors Steel*, 855 F.2d 1510, 1526 (11th Cir. 1988) ("It would, therefore, be ridiculous to remand this case and reassign it to another judge after we have already exercised plenary review and have concluded that summary judgment was proper."); *accord In re School Asbestos Litigation*, 977 F.2d 764, 787 (3rd Cir. 1992); *Harris v. Champion*, 15 F.3d 1538 (10th Cir. 1994); *Rohrbach v. AT&T Nassau Metals Corp.*, 915 F. Supp. 712, 718 (M.D. Pa. 1996).

[11] "Because this appeal required us to discern the meaning of 'obligation,' we engaged in plenary review of the district court's final order." (App. 27).

knows that it will be dismissing the case because the complaint fails to state a claim. Given that the case was dismissed, any ruling on disqualification would have been purely advisory and without practical effect.

CONCLUSION

For all of the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

MICHAEL J. CANTER
VORYS, SATER, SEYMOUR
and PEASE
52 E. Gay Street
Columbus, Ohio 43215
(614) 464-6400

JOHN T. BOESE
(Counsel of Record)
MICHAEL L. WALDMAN
FRIED, FRANK, HARRIS
SHRIVER & JACOBSON
1001 Pennsylvania Avenue, NW,
Suite 800
Washington, DC 20004
(202) 639-7000

Counsel for Respondents

The Limited, Inc.;
The Limited London-Paris-New York, Inc.;
Limited Too, Inc.; Intimate Brands, Inc.;
Victoria's Secret Stores, Inc.;
Victoria's Secret Catalogue, Inc.;
Cacique, Inc.; Mast Industries, Inc.;
Express, Inc.; Lerner New York, Inc.;
Lane Bryant, Inc.; Henri Bendel, Inc.;
Structure, Inc.; Abercrombie & Fitch, Inc.